cases of wilful and wrongful confusion of goods, where the burden rests on the wrongdoer to prove what portion of the entire mass belongs to him.[13] An infringer of a patent right is not a trustee of resulting profits,[14] but where equity takes jurisdiction of an action for infringement, it views the infringer as a trustee for purposes of applying a remedy, depriving him of his unlawful gains and bestowing them upon the injured patentee.[15] It should logically, then, apply to the case of the infringer the same rules of evidence as to that of the trustee, and, where there has been an intermingling by the infringer of profits lawfully and unlawfully acquired, it should place upon him the burden of proving what proportion of such profits were rightfully gained.[16]

CONFUSION OF GOODS.—At common law one who wilfully suppressed or destroyed evidence became subject to the maxim, *Omnia praesumuntur contra spoliatorem,* which justified a court in drawing the most unfavorable conclusion as to the effect of such evidence. It is clear that when a confuser makes the delineation of title and the extent of a loss extremely difficult to ascertain, he can gain no advantage from his own wrong, and must bear the burden of any inconvenience entailed by the confusion.[1] The earliest authorities are quite in accord with this view in declaring that one who, with an improper motive, confuses his goods with those of another so as to render the individual portions indistinguishable, must forfeit his own to the passive party without any accounting. No differential test based on the nature of the property was here involved.[2] But the courts soon realized that even though the individual portions of a confused mass cannot be distinguished, or practicably be separated, if both are of the same substance and quality each owner may recover what is practically, though not identically, his own by regaining a portion of the mass equal to the quantity contributed by him. If, therefore, the individual quantities are known,[3] there is no such difficulty in determining the extent of the injured party's property in the mass, as to

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[13]See The Idaho (1876) 93 U. S. 575.

[14]Courts of equity will not take jurisdiction of actions for infringement of patent rights solely on the ground that the infringer is a trustee. Root *v.* Ry. (1881) 105 U. S. 189.

[15]3 Robinson, Patents § 1137; see Tilgham *v.* Proctor (1887) 125 U. S. 136, 145.

[16]Smith *v.* Motley (1906) 150 Fed. 266; Hart *v.* Ten Eyck (N. Y. 1816) 2 Johns Ch. *62, *108; see National Bank *v.* Ins. Co. (1881) 104 U. S. 54, 66 *et seq.*

[1]Lupton *v.* White (1808) 15 Ves. 432, 439; see Bethel *v.* Linn (1886) 63 Mich. 464; Holloway Seed Co. *v.* Nat. Bk. (1898) 92 Tex. 187. The same principle is applied to confusion of accounts. See Stone *v.* Marshall Oil Co. (1904) 208 Pa. 85.

[2]Anonymous (1594) Popham 38; Warde *v.* Aeyre (1615) 2 Bulst. 323; 2 Bl. Comm.* 405; *cf.* Stephenson *v.* Little (1862) 10 Mich. 433; see Beach *v.* Schmultz (1858) 20 Ill. 186.

[3]If, a reasonable doubt exists as to the quantity belonging to each it is resolved against the party at fault. Osborne *v.* Cargill Elev. Co. (1895) 62 Minn. 400.

necessitate a forfeiture.[4] Moreover, the application of the ancient common law view partakes, in its harshness, of the nature of an imposition of a penalty for an evil motive in a civil action—a proceeding entirely out of accord with the spirit of the common law.[5] The tendency is, therefore, to decree a forfeiture only when the injured party has no other complete remedy against the fraudulent wrongdoer.[6] Accordingly, whenever the confused mass is homogeneous throughout, a wrongful motive on the part of the confuser may be proved to recover punitive damages, but it cannot justify an exemplary penalty as a matter of law.[7]

Forfeiture is thus confined to those cases of confusion originating in a wrongful motive, where either a new article is formed, or the individual portions are different in substance or in quality, and cannot easily be apportioned.[8] A negligent confusion ought never to result in forfeiture unless it is made in violation of a duty imposed by reason of a fiduciary relationship existing between the parties.[9]

Where the confusion is caused by accident,[10] by *vis major*,[11] or by consent of the parties,[12] they are tenants in common of the mass. Neither has, therefore, a right to the proceeds of the entire lot,[13] though if it is apportionable replevin will lie by either for his aliquot share on demand and refusal.[14] The same principles could with justice be applied to cases of confusion by mistake, or under a claim of right, so long as the confuser bears any resulting inconvenience. It is to be noted, however, that the common law does not provide for the case of a confusion honestly brought about, in which no apportionment according to the original shares is practicable. The civil law,[15] while basing no distinction on the motives of the parties,

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[4]Hesseltine *v.* Stockwell (1849) 30 Me. 237; Ryder *v.* Hathaway (Mass. 1838) 21 Pick. 298; Stone *v.* Quaal (1886) 36 Minn. 46; see Rust Land etc. Co. *v.* Isom (1902) 70 Ark. 99; Wilkinson *v.* Stewart (1877) 85 Pa. 255; *cf.* Stephenson *v.* Little, *supra.*

[5]Cooley, Torts (3rd ed.) 69. To be sure, for injuries suffered by reason of the deprivation of his portion, for the time being, the plaintiff may recover specific damages.

[6]Wright *v.* Skinner (1894) 34 Fla. 453; 1 Sutherland, Damages (3rd ed.) § 101.

[7]Hesseltine *v.* Stockwell, *supra.*

[8]See The Idaho (1876) 93 U. S. 575; Jewett *v.* Dringer (1878) 30 N. J. Eq. 291; Jenkins *v.* Steanka (1865) 19 Wis. 139; Holloway Seed Co. *v.* Nat. Bk., *supra;* Beach *v.* Schmultz, *supra.*

[9]Lupton *v.* White, *supra;* Willard *v.* Rice (Mass. 1846) 11 Metc. 493; Hudson *v.* Hawkins (1887) 79 Ga. 274; see Hart *v.* Ten Eyck (N. Y. 1816) 2 Johns, Ch.* 62,* 106.

[10]Spence *v.* Union Ins. Co. (1868) L. R. 3 C. P. 427; Moore *v.* Erie Ry. (N. Y. 1872) 7 Lans. 39.

[11]Intermingled Cotton Cases (1875) 92 U. S. 651.

[12]Adams *v.* Meyers (U. S. C. C. 1870) 1 Sawy. 306.

[13]Davis *v.* Krum (1882) 12 Mo. App. 279.

[14]Kaufman *v.* Schilling (1874) 58 Mo. 218; Freese *v.* Arnold (1894) 99 Mich. 13.

[15]The Institutes of Justinian distinguished between the confusion of liquids (*confusio*) and that of solids (*commixtio*), Sander's Justinian, Inst. lib. II, tit. I, § 28, apparently on the ground that in the latter case the particles may theoretically be separated. Of course, such a distinction would be impracticable for commercial purposes.

declared that if either one kept the whole mass an equitable distribution might be decreed, the judge having discretion to award a greater amount to one because of the better quality of his contribution to the mass. Of course, the only alternative would be to sell the product and equitably distribute the proceeds.

On the consummation of the confusion the right to possession of the whole mass immediately vests in the passive party.[16] Pending disposition of the title,[17] he may, therefore, maintain replevin for the entire lot.[18] Nor will trespass lie against him for taking it,[19] though it is then his duty to give the confuser an opportunity to identify his own or determine his share.[20] The burden is, however, on the latter to identify his own property or lose it.[21] Of course, where the plaintiff sues in trover all difficulties disappear and he recovers the value of his property at the time and place of conversion.[22] Thus in the recent case of *Samuel et al.* v. *Holbrook, Cabot & Rollins Corp.* (App. Div. 1913) 141 N. Y. Supp. 275, a majority of the court held the defendant guilty of conversion on its refusal to return iron of the plaintiff, which had, by mistake, been mixed with its own, although the defendant asserted identification to be impossible. The defendant having acted in good faith, the parties might well be tenants in common of the mass, and it is not in derogation of this fact to declare that, the goods being apportionable, the plaintiff might, on demand and refusal, recover the value of his aliquot share in conversion.[23]

RIGHT TO REGULATE THE RESALE PRICE OF PATENTED ARTICLES.—Previously existing ideas as to the right of the patentee to control the manner in which the vendee or subsequent owner of the patented article may deal with it, by imposing license restrictions at the time of the original sale, have been recently complicated by the decision in *Bauer & Cie* v. *O'Donnell* (1913) 33 Sup. Ct. Rep. 616. The Supreme Court determined that a patentee who has received all the cash consideration, which he contemplated, from the sale of the patented article has no right to regulate the price at which it may be sold thereafter. According to the almost unbroken line of authority prior to this decision the powers of the patentee seem to follow

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[16]The Idaho, *supra;* Stephenson *v.* Little, *supra;* Bryant *v.* Ware (1849) 30 Me. 295; but see Ryder *v.* Hathaway, *supra.*

[17]The civil law made no provision for the right of possession pending the distribution of the shares. Blackstone was evidently led astray in his description of the civil law in this respect, and it is curious to note that the view of the civil law taken by Kent in his commentaries, 2 Kent, Comm.* 364, and followed by Ryder *v.* Hathaway, *supra,* is as clearly erroneous.

[18]See Wingate *v.* Smith (1841) 20 Me. 287.

[19]Bryant *v.* Ware, *supra.*

[20]See The Idaho, *supra;* Bryant *v.* Ware, *supra.*

[21]First Nat. Bk. *v.* Schween (1889) 127 Ill. 573; Holloway Seed Co. *v.* Nat. Bk., *supra.*

[22]Wright *v.* Skinner, *supra;* Burnham *v.* Marshall (1883) 56 Vt. 365; see Hall *v.* Hargadine (1900) 23 Tex. Civ. App. 149.

[23]Stall *v.* Wilbur (1879) 77 N. Y. 158; Ripley *v.* Davis (1866) 15 Mich. 75.